

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 10-0416

In re: Jennifer Caudill, an individual also known as
Jennifer Walker and Jennifer Herriott Walker;

and

Mitchel Kalmanson, an individual,¹

Respondents

Decision and Order as to Mitchell Kalmanson

Appearances: Colleen A. Carroll, Esquire, Office of General Counsel, United States Department of Agriculture, Washington, DC for the Complainant

William J. Cook, Esquire, Tampa, Florida for the Respondents

Preliminary Statement

This license termination proceeding was initiated on September 7, 2010 by Kevin Shea, the Acting Administrator of the Animal and Plant Health Inspection Service (APHIS) pursuant to Animal Welfare Act (the Act or AWA), 7 U.S.C. §2131, *et seq.*, by the filing of an Order to Show Cause Why Animal Welfare Act Licenses 58-C-0947, 55-C-0146 and 58-C-0505 Should Not Be Terminated. The action as brought originally named Jennifer Caudill (also known as Jennifer Walker and Jennifer Herriott Walker) (Caudill), Brent Taylor (Taylor) and William Bedford (Bedford), individuals doing business as Allen Brothers Circus, and Mitchel Kalmanson (Kalmanson) as Respondents.

¹ The Show Cause Order Caption and contents spell Kalmanson's first name as Mitchell. Correspondence from him however indicates that the proper spelling is Mitchel. Letter, dated September 13, 2010, Docket Entry No. 5.

When AWA license 55-C-0146 was voluntarily terminated on May 12, 2012, the issues concerning Taylor and Bedford were resolved. APHIS moved to withdraw the Order to Show Cause concerning Bedford and Taylor and an Order of Dismissal was entered as to them on June 15, 2012.²

Answers, and as to some of the Respondents, Amended Answers were ultimately filed and multiple pleadings, including several Motions to Dismiss, two Motions for Summary Judgment, a Motion to have Complainant's Counsel disqualified from further involvement in the case, and another to recuse "Administrator" L. Eugene Whitfield (in actuality the Department's Hearing Clerk) were filed by Respondents, all of which were denied.³ The matter was originally set for oral hearing in Tampa, Florida to commence on March 22, 2011, but was continued and later rescheduled for June 11, 2012.⁴

At the hearing, thirteen witnesses testified.⁵ Thirty-five exhibits were introduced by the government and eighteen by the Respondents.⁶ Post hearing briefs have been received from all parties and the matter is now ripe for disposition.

Discussion

The Animal Welfare Act enacted in 1970 (P.L. 91-579) draws its genesis from and is an amendment of the Laboratory Animal Welfare Act (P.L. 89-54) which had been enacted in 1966 to prevent pets from being stolen for sale to research laboratories, and to regulate the humane care and handling of dogs, cats and other laboratory animals. The 1970 legislation amended the name of the prior provision to the Animal Welfare Act in

² Order of Dismissal, June 15, 2012, Docket Entry No. 73

³ Docket Entry Nos. 6, 7, 10, 15, 17, 19, 20, 21, 56, and 60.

⁴ Docket Entry Nos. 44, 51, 65, and 67.

⁵ References to the Transcript will be indicated as Tr. and the page number.

⁶ Complainant's exhibits are referred to as CX and the exhibit number. Respondent Caudill's exhibits are referred to as RCX and the exhibit number. Respondent Kalmanson's exhibits are referred to as RKX and the exhibit number. Joint Respondent exhibits are referred to as RCKX and the exhibit number.

order to more appropriately reflect its broader scope.⁷ Since that time Congress periodically has acted to strengthen enforcement, expand coverage to more animals and activities, or conversely, curtail practices that are viewed as cruel or dangerous.⁸

The Act provides that the Secretary shall issue licenses to dealers and exhibitors upon application in such form and manner as the Secretary may prescribe, 7 U.S.C. §2133.⁹ As part of his enforcement authority, the Secretary may suspend or revoke the license of any dealer or exhibitor who violates the Act or its Regulations. 7 U.S.C. §2149(a). The power to require and to issue licenses under the Act includes the power to terminate a license and to disqualify a person from being licensed. *In re: Amarillo Wildlife Refuge, Inc.* 68 Agric. Dec. 77 (2009); *In re: Loreon Vigne*, 67 Agric. Dec. 9620 (2008), *aff'd with modifications*, 67 Agric. Dec. 1060 (2008); *In re: Mary Bradshaw*, 50 Agric. Dec. 499, 507 (1991). Violations of the Act by licensees can result in the assessment of civil penalties, and the suspension or revocation of licensees. 7 U.S.C. § 2149.

The license termination proceedings brought against Kalmanson and the other Respondents appears to have arisen from concerns, suspicions and unverified conclusions

⁷ The Congressional statement of policy is set forth in 7 U.S.C. §2131 which provides in pertinent part: "The Congress finds that animals and activities which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof, and that regulation of animals and activities as provided in this chapter is necessary to prevent or eliminate burdens on such commerce, in order –

(1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;

(2) to assure the humane treatment of animals during transportation in commerce; and

(3) to protect the owners of animals from theft of their animals by preventing the sale or use of animals which have been stolen.

⁸ A 1976 amendment added Section 26 of the Act making illegal a number of activities that contributed to animal fighting. Haley's Act (H.R. 1947) introduced in the 100th Congress made it unlawful for animal exhibitors and dealers (but not accredited zoos) to allow direct contact between the public and large felids such as lions and tigers.

⁹ "... Provided that no license shall be issued until the dealer or exhibitor shall have demonstrated that his facility complies. . "

on the part of Dr. Elizabeth Goldentyer, the Eastern Regional Director for the USDA Animal and Plant Health Inspection Service, Animal Care Program, that the Respondents were engaged in activities designed to circumvent an Order of the Secretary of Agriculture revoking the AWA exhibitor's license previously held by Lancelot Kollman Ramos (Ramos), conduct specifically proscribed by Section 2.11(d) of the Regulations, 9 C.F.R. § 2.11(d).¹⁰ APHIS personnel involved in preparing inspection reports were specifically instructed by Goldentyer and her staff to include language in their reports to the effect that "This licensee appears to be circumventing the revocation of Lancelot Kollman Ramos-2.10(b), 2.11(d), 2.12."¹¹ Tr. 386-387, CX-20 (McFadden), 23 (Geib), 24 (Baltrush), 25 (Baltrush),¹² 28 (Howard).¹³

Dr. McFadden in her testimony indicated that the direction to include that language had come from her supervisor, Dr. Elder Magrid, who reports to Dr. Goldentyer but indicated it was not a conclusion that she, (McFadden), had reached. Tr. 159-160. Dr. Mary Geib testified that she believed her instructions to include the language came from Dr. Goldentyer. Tr. 177-179. Her testimony makes it clear that that there was no factual basis for the conclusory language from what she had observed. *Id.* Jan Baltrush, an experienced USDA Animal Care Inspector since 1988, testified that the directed language was placed in the report only because she was told to and admitted that she had no factual basis for its inclusion. Tr. 198. While possibly not rising to the level of "fraud upon the

¹⁰ "No license will be issued under circumstances that the Administrator determines would circumvent any order suspending, revoking, terminating, or denying a license under the Act." 9 C.F.R. § 2.11(d).

¹¹ Dr. Goldentyer admitted directing both inspectors and supervisors to include the language. Tr. 386. Later, she answered "Yeah. They definitely were given that language." Tr. 437. Excerpts from the APHIS Exhibitor Inspection Guide introduced during the hearing provide that reports should have a clear, detailed description of the non-compliance and include **observations** by the inspecting official and avoid personal comments or administrative messages to the regional office. Tr. 302-303. RCKX-1.

¹² "Should a Contracted Licensee act in a manner that is circumventing the AWA the Cole Brothers Circus may be held responsible." CX-25.

¹³ "This licensee appears to be assisting in the direct circumvention of a USDA revocation order." CX-28.

Court” as suggested by Kalmanson’s post hearing brief, such egregiously improper and inappropriate actions can only be condemned in the strongest terms possible and casts significant doubt upon the ability of the officials involved to properly execute their responsibilities to the public that they serve as part of the “People’s Department.”¹⁴

Ramos’s license No. 58-C-0816) had been revoked effective October 19, 2009 following his unsuccessful appeal of administrative proceedings.¹⁵ At the time of the revocation of his license, Ramos either owned or had in his possession approximately 37 exotic felids being exhibited at circus venues.¹⁶ CX-9. Subsequent to his license being revoked, Ramos sold a number of his animals that were being exhibited in traveling circuses to Jennifer Caudill who assumed the obligations under the agreements that Ramos had made and in return was entitled to the revenue generated from the use of the animals.

Kalmanson’s name appears a total of eight times in the Complaint. It first appears two times in paragraph 4 where he is identified as an individual whose business address is in Maitland, Florida and the holder of AWA License No. 58-C-0505. It next appears in paragraph 5d where it is alleged that seven or eight tigers owned by Ramos were exhibited by Ramos, Soul Circus, Inc., and Respondents Caudill and Kalmanson since February of 2010. Kalmanson’s name again appears two times in paragraph 20 which

¹⁴ Two and a half years after the Department of Agriculture was established in 1862, in what would be his final annual message to Congress, then President Abraham Lincoln called USDA the “People’s Department. As for the obligations of public officials, attention is invited to the oft quoted admonition to prosecutors that while “he may strike hard blows, he is not at liberty to strike foul ones.” *United States v. Berger*, 295 U.S. 78, 88 (1935).

¹⁵ *In re Octagon Sequence of Eight, Inc, et al.*, 66 Agric. Dec. 1093 (2007), *aff’d sub nom. Kollman Ramos v. Dep’t of Agriculture*, 68 Agric. Dec. 60 (2009); 322 Fed App’x 814 (11th Cir. 2009)(not selected for publication.) CX-32, 33.

¹⁶ Ten tigers had been travelling with Feld Entertainment, Inc. (d/b/a Ringling Brothers, Barnum & Bailey); eight tigers and one liger were with the Cole Brothers Circus (Cole Bros); eight tigers were with Soul Circus, Inc. (UniverSoul or Soul); and 10 were being kept at property owned by Ramos’s mother in Balm, Florida. Tr. 673-674, CX-5, 6.

relates to Caudill's preparation of an APHIS Form 7006 conveying seven tigers to Kalmanson¹⁷ and a second form prepared by Kalmanson stating that the animals had been "abandoned" in Atlanta, Georgia. The next mention is in paragraph 22 which relates to a letter from Dr. Goldentyer to Kalmanson expressing her concerns that Lance Kollman (Ramos) intended to use Kalmanson's license. In her letter of March 10, 2010, Dr. Goldentyer wrote that she was "concerned that Mr. Lance Kollman [Ramos] has or intends to use your license, or that of Jennifer Caudill, to engage in activities governed under the Animal Welfare Act....without holding a valid license. CX-16. Paragraph 31 describes a letter that Kalmanson wrote to APHIS and the final mention in Paragraph 34 contains the conclusion that Kalmanson (and Caudill) were operating as Ramos's surrogates.

Complainant's post hearing brief's discussion of Kalmanson's involvement is equally scant and not particularly helpful, containing a proposed finding on page 11 and 12 identifying him as an exhibitor and some discussion of the two APHIS Forms 7006 prepared concerning the seven tigers travelling with Soul. On pages 12 and 13, a proposed finding references Dr. Goldentyer's concerns set forth in her March 10, 2010 letter to Kalmanson.¹⁸ On page 15, another finding relates to Kalmanson's July 13, 2010 letter to APHIS. On page 16, two proposed adverse Conclusion of Law are set forth. Page 19 sets forth the assertion that Kalmanson is unfit for licensure based upon a conclusion that he "engaged in activities to facilitate the circumvention of the Secretary's order

¹⁷ The APHIS Form from Caudill to Kalmanson appears to have been prepared "after the fact" at the request of Todd Nimms of the Georgia Fish and Game so that he had something for his records indicating that she no longer had the cats. Tr. 581, 666-667, CX-14.

¹⁸ Kalmanson responded to the Goldentyer letter by certified letter dated March 25, 2010. RKX-6.

revoking Ramos's license...Additional unsupported conclusions are contained on page 21 and 22. Complainant's Post Hearing Brief, Docket Entry No. 81.

In its brief, Complainant asserts that Kalmanson knowingly "acquired" animals from unlicensed entities. Complainant's Brief, p. 21, Docket Entry No. 81. Not only was there no corresponding allegation of such conduct in the Complaint, the evidence of record indicates Kalmanson's acquisition of the animals was prompted by USDA's informing both of the Soul and Cole Bros. circuses that although Caudill had an exhibitor's license she was not considered qualified to exhibit the animals.¹⁹ Tr. 39, 585-586, 658-659. The evidence further strongly suggests that Kalmanson's acquisition was acquiesced in, if not suggested by USDA officials. Tr. 575, 577-579, 584-589, 614. Moreover, although it is clear that USDA was informed by Kalmanson that he had acquired the animals, the record contains no indication that USDA ever corresponded with Kalmanson objecting to his acquisition of the animals or advising him that the acquisition itself was in any way improper.²⁰ Tr. 454, CX-26, RKX-8.

¹⁹ AWA Exhibitor's Licenses do not contain any restrictions on the face of the license. Dr. Goldentyer testified that a Class C License authorizes the exhibition of any number of animals including tigers. Tr. 312.

²⁰ It is well established that the Animal Welfare Act is considered remedial legislation. *In re Animals of Montana*, 68 Agric. Dec. 92, 106 (2009); *In re Martine Collette, et al.*, 68 Agric. Dec. 768, 786 (2009); *In re Sam Mazzola, et al.*, 68 Agric. Dec. 822, 848 (2009); *In re Loreon Vigne*, 67 Agric. Dec. 1060, 1068 (2008); *In re Tracey Harrington*, 66 Agric. Dec. 1061, 1071 (2007); *In re Mary Jean Williams, et al.*, (Decision as to Deborah Ann Milette), 64 Agric. Dec. 364, 390 (2005); *In re Richard Miehke, et al.*, 64 Agric. Dec. 1295, 1313 (2005); *In re Eric John Drogosch*, 63 Agric. Dec. 623, 645-646 (2004); *In re Wanda McQuarry, et al.*, 62 Agric. Dec. 452, 479 (2003); *In re J. Wayne Shaffer, et al.*, 60 Agric. Dec. 444, 479 (2001); *In re Reginald Dwight Parr*, 59 Agric. Dec. 601, 626 (2000); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 270 (1998); *In re Richard Lawson, et al.*, 57 Agric. Dec. 980, 1012, (1998); *In re David Zimmerman*, 57 Agric. Dec. 1038, 1063 (1998); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 272 (1997); *In re Patrick Hctor*, 56 Agric. Dec. 416, 426 (1997); *In re S.S. Farms Linn County, Inc.*, (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991); and *In re Lloyd A. Good, Jr.*, 49 Agric. Dec. 156, 163 (1990). Despite the remedial nature of the legislation, Dr. Goldentyer expressed unwillingness to give guidance to licensees, particularly if there was an ongoing investigation, as she did not want to "talk people around what the requirements are." Tr. 331-332, 343. While clearly some balancing judgment is necessary, communication of compliance guidance to licensees concerning the standards requirements might well limit if not avoid litigation.

The evidence adduced at trial falls short of establishing the allegations contained in the Complaint. Aside from establishing that Kalmanson had known Ramos for as much as 40 years and that the animals that Kalmanson took custody, control and possession of previously belonged to Ramos, the record is completely devoid of any evidence of Ramos's involvement in Kalmanson's exhibition of the animals once Kalmanson took custody of them.²¹ After being advised by USDA that Caudill was not qualified to exhibit the animals at their circus (Tr. 56, 658-659), Sedrick "Ricky" Walker, one of the owners of Soul, contacted Kalmanson (who at the time was in the United Kingdom on business) on February 25, 2010 and asked him to take custody, control and possession of the felids that were on exhibition with the circus.²² Tr. 569-575, 659. Kalmanson's relationship with Soul was both of long standing and in a variety of capacities. In addition to writing their insurance, he had provided risk management services and in the past provided animals to the corporation. Tr. 568. Jennifer Caudill confirmed that it was Sedrick Walker who had decided to contact Kalmanson. Tr. 659. Given USDA's strong warnings to the circus concerning Jennifer Caudill's lack of qualification to exhibit the animals, despite the financial impact it would have on Caudill, Soul's approaching Kalmanson was entirely reasonable given their established relationship with him. Tr. 658-659. *See*, CX-15.

The second occasion occurred on July 13, 2010 when Kalmanson was approached with a virtually identical request and asked to assume responsibility for the felids

²¹ Although Kalmanson indicated that he had written insurance for Kollman (Ramos), his testimony that he had never had any business enterprise with Ramos was not rebutted. Tr. 604, 624.

²² Caudill had sought to overcome USDA's objection to her lack of experience by calling on an old family friend, William Bedford, to assist her and be responsible for the animals. Tr. 40. Bedford had agreed and Caudill had transferred the animals to him. CX-12. By contacting Kalmanson, Walker declined to allow William Bedford, a licensed exhibitor, to continue to assist Caudill and Bedford was told to leave which he did. Tr. 48.

travelling with the Cole Bros. Circus. Tr. 595-598, RKX-7. In neither instance was Kalmanson required to pay for the animals. The record makes it abundantly clear that while Kalmanson was willing to assume responsibility for the animals, he had no intention of paying anyone to acquire them.²³ Tr. 580, 587-588, 600, 625-626. The record fails to establish any agreement between Jennifer Caudill and Kalmanson. Tr. 605, 665, 667. Although Ms. Caudill may have entertained hopes that she would eventually get the animals back (Tr. 666, 668), Kalmanson's testimony makes it obvious that he took advantage of a business opportunity which was making money exhibiting the animals and that he had no intention of returning the animals to her. Tr. 599-600, 628-629, 636.

On the basis of all of the evidence before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. Respondent Mitchell Kalmanson is an individual residing in and operating his business ventures from the State of Florida. In addition to being a wholesale or retail insurance broker specializing in animal entertainment insurance, load master, and risk management consultant, he owns a number of animals and is licensed as an exhibitor under the Act, holding AWA License No. 58-C-0505. Tr. 561-565. He also owns and maintains a 200 acre facility located north of Orlando which is not open to the public at which he keeps some of his animals. Tr. 566.

2. Although the record reflects conflicting evidence as to actual title of the animals, at the request of Soul Circus, Kalmanson took custody, control and possession of seven tigers (Egor, Jellie, Natasha, Savannah, Diva, Gondie, and Chad) on February 25, 2010.

²³ The record does indicate that upon acquiring the animals, he took the animals and spent the money "to bring them up to my standards" by having them micro-chipped and examined by a veterinarian." Tr. 580, 605-613, 635

An APHIS form 7006 was completed by Kalmanson on that date indicating that the tigers had been abandoned and were delivered by Soul Circus to Kalmanson.²⁴ CX-14, RKX-3.

3. On or about July 13, 2010, at the request of Cole Bros Circus, Kalmanson took custody, control and possession of eight tigers and one liger (Aztec, Tahar, Appollo, Mohan, Chercon, Rambo, Mariha, Shakira and Zeus) that had been traveling with the Cole Bros. circus. On July 13, 2010, Kalmanson wrote to APHIS concerning the circumstances of his acquiring the animals. CX-26, RKX-8.

4. All of the animals acquired by Kalmanson had previously belonged to Lancelot Kollman Ramos.

5. Kalmanson acknowledged knowing Ramos for “probably 40 years;” however, the record is completely devoid of any contact between the two individuals in connection with Kalmanson’s acquisition of the animals or with Kalmanson’s subsequent use of them.

6. The instructions given by Dr. Elizabeth Goldentyer, the Eastern Regional Director for the USDA Animal and Plant Health Inspection Service, Animal Care Program and her staff to APHIS personnel involved in preparing inspection reports to include language in their reports to the effect that “This licensee appears to be circumventing the revocation of Lancelot Kollman Ramos-2.10(b), 2.11(d), 2.12” impermissively and inappropriately tainted the investigation of Kalmanson’s conduct.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

²⁴ Jennifer Caudill had previously prepared an APHIS Form 7006 conveying the animals to Brent Taylor and William Bedford; however, Bedford later disclaimed ownership. Tr. 60, CX-12, 22. A second form prepared by Caudill purporting to convey the same animals to Kalmanson was completed at the behest of and to satisfy Todd Nimms, a Georgia Fish and Wildlife officer. fn. 17.

2. The evidence is insufficient to find that Respondent Kalmanson is unfit to hold an AWA license or that maintenance of a license by him would in any way be contrary to the purposes of the Act.

3. Assuming he otherwise meets the eligibility requirements of 7 C.F.R. §1.184, the award of Equal Access to Justice Act (EAJA) fees to Respondent Kalmanson is appropriate.

Order

1. The determination by the Administrator that Respondent Mitchell Kalmanson is unfit to be licensed as an exhibitor under the Act is **REVERSED** and the license termination proceedings against AWA License No. 58-C-0505 are **DISMISSED**.

2. Any application for EAJA fees shall be submitted not later than 30 days after this Decision and Order becomes final. In the event of appeal by the Complainant within that period, action on the application will be deferred until a final Decision is entered.

2. This Decision and Order shall become final and effective without further proceedings thirty-five days after service on the Respondents, unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days, pursuant to section 1.145 of the Rules of Practice, 7 C.F.R. §1.145.

Copies of this Decision and Order will be served upon the parties by the Hearing Clerk.

September 24, 2012



Peter M. Davenport
Chief Administrative Law Judge

Copies to: Colleen A. Carroll, Esquire
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